No. 21795-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET C. LOWTHIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

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I.

The Partnership SBIC Was Not Engaged in the Business of Selling Land to Customers in the Ordinary Course, and the Land in Question Was Not Held Primarily for Sale in Such a Business.

The Commissioner's argument is that in the purchase of the land in question it was obviously intended that the land would be developed (in order to pay the purchase price); the seller imposed restrictions which would assure that some of the land would be developed; and since some of the partners of the purchasing partnership (SBIC) had interlocking relationships with a development company which had an option to acquire 500 acres of the 4,500 acres in question, the purchaser SBIC must be held to have held all the land in question primarily for sale to customers in the ordinary course of its trade or business.

We submit there is a glaring fallacy here. Admittedly, development of a portion of the land was contemplated. As the Commissioner states, "It was contemplated that the proceeds from the sale of 500 acres to LMDC would pay the first 5 installments." (Br. 29). Also, "* * * the sale of 500 acres to LMDC would generate sufficient income to pay for the first 5 or 6 annual installments." (Br. 33).

But we are not dealing here with this first 500 acres —acres which were subject to option to LMDC at the time the SBIC partnership acquired the land. The development and sale by LMDC of those 500 acres obviously would result in ordinary income to it. That is beside the point.

And it is equally obvious why the seller would be interested in having some development take place on its property, in the event a repossession were necessary.

We are concerned here, however, with the balance of the land: was it held by the partnership SBIC for investment or was it held primarily for sale to customers in the ordinary course of a trade or business of SBIC of selling property to customers?

The Commissioner admits that none of the usual criteria are present here, such as solicitation, amount of sales, advertising, the length of time held, etc. (Br. 25-26). But the Commissioner seeks to brush this absence aside as merely making it more difficult to determine the taxpayer's primary motive (Br. 26).

This, we submit, is a shallow analysis. The general guidelines or criteria are not resorted to in a vacuum or for mere intellectual pursuit. Rather, the statutory language requires a determination as to whether a

taxpayer is engaged in a trade or business of selling property to customers in the ordinary course, and, if so, whether the property in question is held *primarily* for sale to such customers in the ordinary course of such trade or business.

Now, the guidelines are resorted to in an effort to determine whether the taxpayer is in fact engaged in a trade or business of selling property to customers in the ordinary course. And in this respect the activities of the taxpayer are important. Were sales solicited? Did the taxpayer advertise? How numerous were the transactions?

Here we admittedly have none of these things. No advertising. No solicitation of sales. No amount of sales. In fact, no sale at all by this partnership out of property not subject to the option outstanding when it acquired the property.

So, we revert to the question: was this entity, SBIC, though it did none of these things, engaged in the business of holding land for sale to customers in the ordinary course and was the land in question so held?

The Commissioner argues that, no, the SBIC partnership did not engage in such business directly, but some of its partners were involved as "interlocking participants" in the development company that had the option on the 500 acres, and if all had gone well additional acreage would have been sold to the development company or to other developers.

But the facts are that petitioner Margaret C. Lowthian was not one of such "interlocking participants." Things did not go well. The development company went bankrupt. And there was no sale by SBIC of

any acreage to that company or to any other developer.

So, we revert to the question: was SBIC engaged in the business of selling land to customers in the ordinary course of its business? It never made such a sale. It was not engaged in such a business.

II.

The Commissioner's Attempted Distinction of United States v. Rosebrook (C.A. 9, 1963) 318 F. 2d 316, Is Without Merit.

The Commissioner devotes footnote 4 (Br. 26-27) to an attempt to distinguish *United States v. Rosebrook* (C.A. 9, 1963), 318 F. 2d 316. The Commissioner quotes from the *Rosebrook* opinion—

> "* * * She received it (her interest in the property) without any conditions and without any obligation to sell her interest in the jointly held property to a corporation in which she had no interest and which was owned and controlled by the organizers of the joint venture, who intended to operate it for their and not her profit. In our view their intent may not be imputed to her."

The Commissioner then asserts that Margaret C. Lowthian, in marked contrast, "willingly made her own decision to enter the partnership; she invested her own funds; and also agreed that not only would she not take part in the partnership but that the general partners would determine the general business policy of the partnership."

But the point is this: Margaret C. Lowthian invested her money in an entity which "did not engage in direct sales efforts" (Comm. Br. 26), and which the Commissioner asserts held property for sale to customers only

because of and in the light of "interlocking participations" between some of SBIC's partners and LMDC. But in these "interlocking participations," if they existed, Margaret C. Lowthian had no interest; and these "interlocking participations" were not intended to be operated for her profit. She had no interest in them. As this Honorable Court stated in the *Rosebrook* opinion:

> "* * * The able District Judge in a well-reasoned opinion pointed out that not all participants in a joint venture need have the same intent and purpose. 'For some it may be just a step in carrying on their business; for others it may be merely a single opportune investment with a view of ultimate profit but unrelated to any business of the participant, as in the case of (Taxpayer) * * * here'."

If, as seems to be the case here, the sole basis for an adverse decision, as to some of the partners in the present joint venture, is that this was merely "a step in carrying on their business," as evidenced by their direct or indirect participation in a development company, the fact is that as to Margaret C. Lowthian this was "a single opportune investment with a view of ultimate profit" but unrelated to any business in which she was engaged, either directly or indirectly.

In other words, if the interlocking relationship is the basis for branding certain participants with ordinary income, that basis is and always was lacking as to Margaret C. Lowthian. Their intent, the intent of the interlocking participants, may not be imputed to her.